Supreme Court, U.S.
FILED
AUG 28 2000
CLERK

No. 00-152

In The

Supreme Court of the United States

VICTORIA L. BRADSHAW, an individual, in her official capacity as Labor Commissioner of the State of California; LLOYD W. AUBRY, JR., an individual, in his official capacity as Director of the Department of Industrial Relations of the State of California; DANIEL DELLAROCCA, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROGER MILLER, an individual, in his official capacity as Deputy Labor Commissioner of the State of California; ROSA FRAZIER, an individual, in her official capacity as Deputy Labor Commissioner of the State of California; DIVISION OF LABOR STANDARDS ENFORCEMENT, an agency of the State of California; DEPARTMENT OF INDUSTRIAL RELATIONS, an agency of the State of California,

Petitioners,

v.

G & G FIRE SPRINKLERS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN A. SEIDEMAN, ESQ.
LEVIN, STEIN, CHYTEN & SCHNEIDER
12424 Wilshire Boulevard, Suite 1450
Los Angeles, CA 90025-1048
Telephone: (310) 207-4663

Attorney of Record for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Petition sets forth four questions, allegedly presented by this case (Pet. p. i). None of the four questions asserted by Petitioners are presented by this case.

The questions presented by this case are as follows:

"When state law enforcement officials assess civil penalties, and forfeitures, for alleged violations of state law; and order seizure of money on account thereof, must they comply with the due process clause of the fourteenth amendment."

"Is notice and a pre-deprivation, or prompt post-deprivation; hearing required, when state law enforcement officials assess civil penalties, and forfeitures, for alleged violations of state law; and order seizure of money on account thereof."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

I. SUMMARY OF THE ARGUMENT 1

II. INTRODUCTION..... 2

III. THE QUESTIONS PRESENTED, AS STATED IN THE PETITION, ARE NOT ISSUES PRESENTED BY THIS CASE 6

A. The Court Did Not Consider Whether Every Nonpayment to a Contractor Is a Deprivation of Due Process 6

1. This Is Not A Breach Of Contract Action 7

B. The Court Did Not Consider Whether Action Within the Absolute Discretion of a Private Party Constitutes State Action ... 10

1. The Conduct Challenged in this Action Is Clearly State Action..... 10

a. This Action Is Distinguishable From *American Manufacturers Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999) With Regard To The Issue Of State Action For The Following Reasons 11

C. The Court of Appeals Did Not Consider Whether a Third Party Not Targeted by Statute Suffers a Denial of Due Process Where the Impact Is at Most Indirect.... 14

D. The Case Does Not Raise the Question of Whether a Contractor Who Has Not Alleged an Entitlement to Public Funds Can State a Claim for Denial of Due Process Based on the State's Withholding Said Funds 17

TABLE OF CONTENTS – Continued

Page

IV. AMERICAN MANUFACTURES MUTUAL INSURANCE V. SULLIVAN IS DISTINGUISHABLE, AND NOT APPLICABLE TO THIS CASE 20

V. THE COURT OF APPEAL DECISION DOES NOT CONFLICT WITH ANY OTHER DECISIONS 21

VI. THIS CASE DOES NOT INVOLVE MARKETPLACE ACTIVITY BY THE STATE..... 22

VII. THE PETITION INCLUDES A NUMBER OF INCORRECT STATEMENTS 24

VIII. CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

American Manufacturers Mutual Insurance v. Sullivan
526 U.S. 40, 119 S.Ct. 977 (1999) ..... *passim*

Associated General Contractors v. Coalition for Economic Equity
950 F.2d 1401 (9th Cir. 1991) 10, 14

Bleeker v. Dukakis
665 F.2d 401 (1st Cir. 1981) 21

Board of Regents v. Roth
408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) 18

Brown v. Brienen
722 F.2d 360 (7th Cir. 1983) 21

Building and Construction Trades Council of the Metropolitan District v. Associates Builders and Contractors of Massachusetts
507 U.S. 218 (1993) 22, 23

Christ Gatzonis Electrical Contractor, Inc. v. New York School Construction Authority
23 F.3d 636 (2nd Cir. 1994) 21

Flast v. Cohen
392 U.S. 83 (1968) 10, 14, 16

Fuentes v. Shevin
407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) .. 5, 18

G & G Fire Sprinklers v. Bradshaw
156 F.3d 893 (9th Cir. 1998) 6, 9, 11, 21

TABLE OF AUTHORITIES – Continued

Page

Kruegar v. San Francisco
198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988) 3, 4

Logan v. Zimmerman Brush Co.
455 U.S. 422, 101 S.Ct. 1148, 71 L.Ed.2d 265 (1982) 18

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992) 11, 14

Lusardi v. Aubry
1 Cal.4th 976, 4 Cal.Rptr.2d 837 (1992) ..... *passim*

Martz v. Village of Valley Stream
22 F.3d 26 (2nd Cir. 1994) 21

O'Bannon v. Town Court Nursing Center
447 U.S. 773, 100 S.Ct. 2467 (1980) 15

S & D Maintenance v. Goldin
844 F.2d 962 (2nd Cir. 1988) 21

San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino
825 F.2d 1404 (9th Cir. 1987) 21

Sniadach v. Family Finance Corp.
395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) 5, 12, 18

United States v. James Daniel Good Real Property
510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993) 5

Warth v. Selvin
422 U.S. 490 (1975) 10, 14, 16

Wisconsin Department of Industry v. Gould
475 U.S. 282 (1986) 22, 23

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

California Labor Code § 90.5 .....3, 7, 8, 24
California Labor Code § 1720 3
California Labor Code § 1727 .....3, 8
California Labor Code § 1729 .....15, 16
California Labor Code §§ 1731-1733 4
California Labor Code § 1775 3
California Labor Code § 1777 .....4, 8
California Labor Code § 1776(g) 3, 8
California Labor Code § 1813 3

I. SUMMARY OF THE ARGUMENT

The questions presented in the Petition are not raised by this case. The issue presented in this case was whether due process is required when law enforcement officials assess civil penalties and forfeitures for alleged violations of state law, and seize money on account thereof. The California Supreme Court has held that the actions of the state officials is regulatory, and not proprietary conduct; and does not constitute a contractual dispute. The holding of the California Supreme Court, as to California law, is binding on all other courts.

The procedure which was challenged is similar to a writ of attachment or garnishment. State law enforcement officials ("DLSE") order property owners ("awarding bodies") to hold money, for transmittal to DLSE, on account of civil penalties and forfeitures assessed by DLSE for alleged violations of the state labor code. The orders are issued without notice, hearing, or explanation. The DLSE is not in privity of contract with the awarding body. The order must be complied with, under threat of criminal prosecution. The only remedy is to file a lawsuit for return of money seized, and the money must be held until final judgment, and exhaustion of all appellate rights, which can take years. The Court of Appeals held that a prompt post-deprivation hearing is required to determine whether there is adequate grounds for the seizure.

The decision of the Court of Appeals does not conflict with any other decision. The DLSE position conflicts with longstanding due process precedents. There are a

myriad of state laws regulating the performance of contracts, both public and private. If adopted, the DLSE position would hold that state enforcement officials could assess civil penalties for alleged violations of state law, and seize money due on account thereof, without due process; so long as state law obligates businesses to comply with the law when performing a contract. The DLSE position advocates an unprecedented contraction of due process rights, and expansion of government power.

The Court of Appeals decision expressly states that mere contractual disputes do not give rise to a due process claim. There is nothing in the decision which suggests, or holds, that public entities, who are parties to a contract, must provide a due process hearing when acting in accordance with their proprietary interests as a marketplace participant. DLSE's contention that special status, such as tenure for a teacher, is required, is incorrect. Even a temporary, non-tenured teacher has due process rights, if money owed, is seized for civil penalties assessed for alleged violations of state law.

II. INTRODUCTION

G&G FIRE SPRINKLERS, INC. ("G&G") filed this action seeking declaratory and injunctive relief. G&G sought a declaration that the notice to withhold procedure utilized by the California Division of Labor Standards Enforcement ("DLSE") in connection with enforcing prevailing wage laws violates the Fourteenth Amendment of the United States Constitution. The defendants in the action were DLSE, and certain officials thereof. DLSE is ~~an~~ agency of the State of California.

DLSE is mandated by California law as the agency responsible for enforcement of the California Labor Code. *Cal. Labor Code* § 90.5. DLSE is mandated to enforce the so-called prevailing wage law statutes. *Cal. Labor Code* § 90.5(b). DLSE is authorized by statute to impose civil penalties for violations of various statutory provisions; and forfeitures of alleged wage underpayments; and to seize money on account thereof, without any notice or hearing. *Cal. Labor Code* §§ 1727, 1775, 1776(g), 1813. *Kruegar v. San Francisco* 198 Cal.App.3d 1; 243 Cal.Rptr. 585 (1988). No person, including the person alleged to have violated the Labor Code, is entitled to notice or hearing before the assessment of civil penalties or forfeitures, and seizure of money on account thereof. Furthermore, there is no procedure for a prompt post-deprivation hearing. The District Court, and Court of Appeals, held that such action violates the due process clause.

The notice to withhold is an order to the "awarding body" (i.e., the public entity that awarded a public works contract or private owner receiving public funds) requiring the withholding of money due under a public works contract, for transmittal to DLSE. *See*, Exc. 23, Exhibit 2A, 2B, 2C.[1] The awarding body may be a city or other public entity created by California law, or a private owner of a project funded, in whole or in part, by public monies. *Cal. Labor Code* § 1720. Under California law, there is no privity of contract between the DLSE and the awarding body. *Lusardi v. Aubry* 1 Cal.4th 976, 995; 4 Cal.Rptr.2d 837

---

[1] The reference "Exc." is to the excerpts on appeal which were filed in the Court of Appeals.

(1992). The awarding body is obligated to comply with the DLSE order, under threat of criminal prosecution. *Cal. Labor Code* § 1777. The contractor may file a lawsuit within ninety days of completion of the project for recovery of the monies withheld. *Cal. Labor Code* § 1731. The lawsuit is the exclusive remedy for recovery of monies withheld, no issue other than the validity of the civil penalties and assessment of wages due may be presented in the action; and the contractor has the burden to prove the invalidity of DLSE's assessment of civil penalties and wages due. *Cal. Labor Code* §§ 1731-1733. If a lawsuit is not filed within the ninety-day period, the monies are transmitted to DLSE. Exc. 23, Exhibits 2A, 2B, 2C. If a lawsuit is filed, the money must be withheld until final judgment is entered, including exhaustion of all appellate rights. *Krueger v. San Francisco* 198 Cal.App.3d 1, 243 Cal.Rptr. 585 (1988); *Cal. Labor Code* §§ 1731-1733. Even if the notice to withhold is without merit, it can take years for the contractor to recover the money seized on account of civil penalties and forfeitures. The contractor is required to continue to perform work, even though the money which would fund performance has been seized by DLSE. A failure to continue performance constitutes a breach of contract, subjecting the contractor to a claim by the awarding body for damages. The civil penalties alone, which are assessed without notice or explanation, can be hundreds of thousands of dollars. The procedure allows DLSE enforcement officials to inflict severe injury, with no constitutional constraint. The evidence established that contractors are often forced out of business by a notice to withhold.

The United States Supreme Court has repeatedly held that a temporary deprivation pending the outcome of an underlying lawsuit requires due process. *United States v. James Daniel Good Real Property* 510 U.S. 43, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); *Sniadach v. Family Finance Corp.* 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); *Fuentes v. Shevin* 407 U.S. 67, 85, 92 S.Ct. 1983, 32 L.Ed. 556, 572 (1972).

DLSE asserts, without any basis, that the case does not involve state action and/or solely involves issues of breach of contract.

DLSE points out that the Supreme Court granted DLSE's previous petition for writ of certiorari, and remanded the case for further consideration in light of *American Manufacturers Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999). DLSE fails to point out that it filed a petition for writ of certiorari which stated that the issue addressed by the Court of Appeals in this case is as follows:

> "Is a commercial contractor who claims that a public agency breached a contract by failing to make payment entitled by the due process clause of the fourteenth amendment to anything more than an opportunity to pursue its contract claims through an ordinary state court lawsuit?"

No such issue is raised by this case. The contention that this is a breach of contract action has been completely rebutted. There is no reason to grant certiorari.

III. THE QUESTIONS PRESENTED, AS STATED IN THE PETITION, ARE NOT ISSUES PRESENTED BY THIS CASE.

A. The Court Did Not Consider Whether Every Nonpayment to a Contractor Is a Deprivation of Due Process

The Court of Appeals expressly held that this case did not involve breach of contract. The Court stated:

> "[W]e must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts. . . . Even though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection . . . Drawing on these principles, the state asserts that because the withholding procedure at issue is contained in G & G's contract, this case is nothing more than a contractual dispute that does not rise to the level of a constitutional claim. Moreover, the state argues that construing this case to present a constitutional claim would result in the 'federalization' of state contract law by giving G & G and all others who contract with the state an opportunity to have their grievances reviewed in federal court when they should be confined to their contractually bargained-for remedies under state law. This argument, however, misses the mark. *Unlike the cases cited by the state, this case does not involve a breach of contract claim or a challenge to the contract itself.*" (Emphasis added).

G & G Fire Sprinklers v. Bradshaw 156 F.3d 893, 901-902 (9th Cir. 1998).

1. This Is Not A Breach Of Contract Action

DLSE contends that this case involves nothing more than a contractual dispute between parties to a contract. The contention that this case involves a mere breach of contract dispute is completely rebutted for the following reasons:

a. DLSE enforces the regulatory power of the state, not the proprietary interests of the awarding body. *See Lusardi supra* at 995; see also Section VI *infra*.

b. The California Supreme Court has held, as a matter of state law, that DLSE's activities in enforcing the prevailing wage laws are not contractual. *Lusardi v. Aubry* 1 Cal.4th 976, 4 Cal.Rptr.2d 837 (1992). The California Supreme Court expressly held that DLSE enforcement actions are, in no way, dependent upon a contract. The California Supreme Court held that the DLSE enforcement actions are undertaken to enforce statutory obligations imposed by the California Labor Code. *Id. See also Cal. Labor Code* § 90.5(b). The California Supreme Court analogized the actions of DLSE to that of a criminal prosecutor. *Lusardi* at 992. The California Supreme Court holding on this issue of state law is binding on all other courts.

c. DLSE is not a party to any contract. The California Supreme Court expressly held in *Lusardi* that there is no privity of contract between DLSE and the awarding body. *Lusardi* at 995. Once again, since this is an issue of state law that has been decided by the California Supreme Court, it may not be reconsidered by any other court.

d. DLSE assesses civil penalties for violations of state law. Under California law, penalty provisions in a contract are void. The assessment of civil penalties can never be a matter of contract.

e. The California Supreme Court has held that the prevailing wage laws are intended to protect and benefit employees, and not to benefit the public entity which awarded the contract. *Lusardi supra* at 985, 987 and 995. DLSE's actions are to enforce the state law, which implements public policy, and not pursuant to any contractual dispute between parties to a contract. *See Cal. Labor Code* § 90.5.

f. The notice to withhold effectuates a seizure of money due under the contract, similar to a writ of attachment or garnishment. The notice to withhold procedure only causes seizure of "money due" under the contract. *Cal. Labor Code* §§ 1727 and 1776(g). Section 1776(g) expressly states that "penalties shall be withheld from progress payments *then due*." Section 1727 says payments are to be withheld from "money due." The California Supreme Court expressly stated that the forfeitures and penalties are withheld "from sums due under the contract." *Lusardi supra* at 986. The notices to withhold issued by DLSE state "you are directed to withhold and retain *from any payments due the general contractor* the total amount of ___ which is the sum of all wages and penalties forfeited pursuant to the provisions of Labor Code § 1727 . . . " Exc. 23, Exhibit 2B.

g. Officials of the awarding body are obligated to comply with the notice to withhold, under threat of criminal prosecution. *Cal. Labor Code* § 1777.

h. Usual breach of contract remedies do not apply. *See G & G Fire Sprinklers supra* 156 F.3d at 902, fn. 6.

i. The civil penalties, and forfeitures for alleged wage underpayments, are not contract damages. The awarding body is not liable for penalties, or wages.

j. DLSE did not dispute the following statement of uncontroverted facts and conclusions of law in the District Court:

> "13. DLSE undertakes the function of enforcement of the California Labor Code provisions relating to payment of prevailing wages.
>
> 14. The aforesaid prevailing wage requirement applies to all construction projects for which the entity awarding the prime contract is a public entity (hereinafter referred to as the "Awarding Body").
>
> 15. Defendants have adopted, and utilized, the practice and procedure of issuing notices to withhold money to Awarding Bodies on account of wages and penalties due for alleged violations of California laws relating to payment of prevailing wages.
>
> 16. The notices to withhold issued by Defendants require Awarding Bodies to withhold monies otherwise due to contractors in the amount set forth in the notice.
>
> 17. The result of the issuance of a notice to withhold by Defendants is the withholding of money otherwise due and payable to contractors who have been the subject of such notice to withhold."

Excerpt from record No. 9, docket sheet ___.

The contention that this case involves a mere contractual dispute between parties to a contract is completely without merit.

B. The Court Did Not Consider Whether Action Within the Absolute Discretion of a Private Party Constitutes State Action

1. The Conduct Challenged in this Action Is Clearly State Action

DLSE asserts that the conduct challenged in this action is that of a private contractor. The assertion by DLSE is completely incorrect. G&G's challenge was to the conduct of the DLSE officials in issuing notices to withhold. The pleadings, the proceedings in the District Court, and the opinion of the Court of Appeal all address that issue. It is axiomatic that actions of state law enforcement officials, pursuant to their mandate to enforce state law, constitute state action.

DLSE contends that G&G has standing to challenge the notice to withhold procedure only as a subcontractor. The pleadings and evidence in the District Court established that G&G had standing to challenge the notice to withhold procedure as both a prime contractor and a subcontractor. G&G had been subject to notices to withhold as both a prime contractor and a subcontractor. Exc. 9, ¶¶14, 15; Exc. 23, ¶¶5, 8. Hence, G&G clearly had standing to seek declaratory and injunctive relief with regard to the notice to withhold procedure, as both a prime contractor and subcontractor. *Associated General Contractors v. Coalition for Economic Equity* 950 F.2d 1401 (9th Cir. 1991); *Flast v. Cohen* 392 U.S. 83 (1968); *Warth v.*

Selvin 422 U.S. 490 (1975); *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992).

Moreover, a subcontractor has standing to challenge the constitutionality of the DLSE action since the subcontractor is the target of the enforcement action, the penalties or forfeitures are based on alleged violations of the Labor Code by the subcontractor, and state law provides that the subcontractor bears the economic burden of the notice to withhold. *Id. See also G & G Fire Sprinklers v. Bradshaw* 156 F.3d 893, 899-901 (9th Cir. 1998).

a. This Action Is Distinguishable From *American Manufacturers Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999) With Regard To The Issue Of State Action For The Following Reasons

1. In *Sullivan*, the defendants were private insurance companies. In *Sullivan*, the Supreme Court characterized the argument by stating, "The argument goes, we need not concern ourselves with the identity of the defendant." In this case, the defendants are public agencies and officials of the State of California.

2. In *Sullivan*, the court stated that "The party charged with the deprivation must be a person who may fairly be said to be a state actor." The court held that private insurance companies were not state actors. In this case, it is the defendant DLSE who assesses civil penalties and forfeitures, and orders seizure of money on account thereof. This action deals with a state actor.

3. As explained above, G&G has standing as a prime contractor, and as a subcontractor, to seek declaratory and injunctive relief with regard to the notice to withhold procedure. Moreover, even as a subcontractor, G&G has standing to challenge the notice to withhold procedure. The action challenged is that of the DLSE. Even assuming, arguendo, that the issue was whether state action was involved in the pass-through of the withholding to the subcontractor; under *Sullivan*, there is state action. *Sullivan* states that there is state action, even as to conduct by private parties, where "The state has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state." Clearly, the state exercises coercive power, when DLSE assesses civil penalties and forfeitures based on alleged violations of the Labor Code by a subcontractor, and then seizes money due to the prime contractor, while authorizing the prime contractor to withhold such money from the subcontractor. If the prime contractor does not withhold payment from the subcontractor, the prime contractor suffers the loss. The conduct of DLSE also provides such significant encouragement that the action must be deemed that of the state. The contention that the prime contractor may, if he chooses, pay money to the subcontractor, is immaterial. For example, in *Sniadach supra*, the employer who received the garnishment order was free to pay wages to the employee. However, doing so would not relieve the employer of liability under the garnishment order. In this case, payment by a prime contractor to the subcontractor does not relieve the prime contractor of liability under the notice to withhold.

4. In *Sullivan*, the Supreme Court expressly relied on the fact that it is solely a private party which makes the determination whether to dispute the claim for benefits under the policy. The Supreme Court stated that the decision "is made by concededly private parties, and turns on judgments made by private parties without standards established by the state." In this action, the determination to assess civil penalties and forfeitures for alleged violations of the Labor Code, and to issue an order to withhold, is made by DLSE. In this case, it is the government which initiates the action resulting in the seizure of money. In *Sullivan*, there was merely a dispute by a private party with a private insurance company.

5. In *Sullivan*, the Supreme Court described the procedure as one of "state inaction, or more accurately, a legislative decision not to intervene in a dispute between an insurer and an employee over whether a particular treatment is reasonable and necessary." This case does not involve "state inaction." This case involves state law enforcement officials undertaking enforcement action for alleged violations of state law.

6. In *Sullivan*, the private insurance company could seek a determination from a state administrative tribunal (called the "URO") with regard to whether treatment was reasonable and necessary. The Supreme Court stated that, while the decision to submit a case to the URO is not state action, any decision by the URO is state action. In this case, it is DLSE that makes the decision that the State Labor Code was violated, and assesses civil penalties and forfeitures, and an order to withhold.

7. *Sullivan* did not involve a seizure of money by a third party. *Sullivan* was a dispute between the worker and the insurer. No third party issued an order to the insurer, to withhold money due under the policy, on account of civil penalties and forfeitures which had been assessed by a state enforcement agency. The Supreme Court expressly distinguished such a case in *Sullivan*. The Supreme Court stated, "In the present case, of course, there is no effort by petitioners to seize property of respondents by an ex parte application to a state official." In this case, DLSE makes ex parte assessments of penalties and forfeitures, and issues orders to withhold money due on account thereof.

C. The Court of Appeals Did Not Consider Whether a Third Party Not Targeted by Statute Suffers a Denial of Due Process Where the Impact Is at Most Indirect

G&G had standing to seek declaratory and injunctive relief with regard to the notice to withhold procedure, as both a prime contractor and subcontractor. *Associated General Contractors v. Coalition for Economic Equity* 950 F.2d 1401 (9th Cir. 1991); *Flast v. Cohen* 392 U.S. 83 (1968); *Warth v. Selvin* 422 U.S. 490 (1975); *Lujan v. Defenders of Wildlife* 504 U.S. 555 (1992). DLSE's contention that G&G's injuries consist solely of non-actionable indirect averse effects of governmental action is without merit, even where G&G acts as a subcontractor.

DLSE has issued notices to withhold asserting violations by G&G as a subcontractor. (*See*, Exc. 23; Ex. 2).

Labor Code 1729 provides for withholding from a subcontractor in such circumstances. Thus G&G, as subcontractor, is not only the accused party, but also bears the financial burden of the withholding. An accused subcontractor has no remedy against the prime contractor, as the Labor Code allows for withholding payment from the subcontractor so long as the notice to withhold by DLSE remains in effect. *Cal. Labor Code* § 1729.

DLSE asserts that under *O'Bannon v. Town Court Nursing Center* 447 U.S. 773, 100 S.Ct. 2467 (1980), G&G cannot assert a claim. DLSE's contention is without merit. *O'Bannon* does not bar G&G's claim. To the contrary, *O'Bannon* expressly makes clear that G&G may assert a claim. *O'Bannon* concerned a nursing home which had been certified to provide care for patients receiving Medicare/Medicaid. The government revoked the certification pursuant to proceedings instituted against the nursing home (Town Court). There was no dispute that due process was provided to Town Court. Certain patients of the nursing home contended that they had a separate right to a due process hearing before the certification could be revoked. *In this case,* unlike *O'Bannon, no one was given due process;* since the prime contractor is not provided due process. Moreover, *the Supreme Court expressly distinguished a situation where governmental action against a person is intended or expected to affect a third person who is considered the responsible party. Id.* at 789, fn. 22.

A notice to withhold, due to alleged violations by a subcontractor, is precisely the type of situation distinguished by the court in *O'Bannon*. The statutory scheme provides that upon the assertion of forfeitures and/or

penalties on account of a subcontractor, the subcontractor's money is withheld (*Cal. Labor Code* § 1729). The deprivation of such money is not a mere incidental effect of the governmental action. To the contrary, it is the expected and intended effect. The subcontractor is the alleged violator of the law, who is targeted by the notice to withhold.

In *O'Bannon*, the court explained that the nursing home had a due process right to contest the decertification, and was the party with the greatest interest in doing so. *Id.* at 789 fn. 22; 797. Under California Labor Code, *neither* the prime contractor or subcontractor is entitled to due process. Moreover, if a subcontractor's money is withheld, the prime contractor has no financial incentive to contest the action.

In *Flast v. Cohen* 392 U.S. 83 (1968) the court held that plaintiff's status as a taxpayer was sufficient to confer standing to attack a statute providing for the payment of government money to a religious school.

In *Warth v. Selvin* 422 U.S. 490 (1975), the court held plaintiff had standing to attack the constitutionality of exclusionary zoning. The court explained to have standing a party need merely only show some injury due to the governmental action. The court stated so long as the plaintiff suffered some injury, the plaintiff may invoke the rights of others. *Warth supra* at 501. The court further explained that a third party has standing where its injury resulted indirectly in the deprivation of the rights of another. *Id.* at 504-505.

G&G was the target of the unconstitutional action. G&G suffered substantial injury due to the unconstitutional procedure. Clearly, G&G has standing to assert the unconstitutionality of the procedure.

Under the theory of DLSE, no one has standing to challenge the unconstitutional conduct. DLSE says a subcontractor has no standing, because the order seizes money due the prime contractor; and a prime contractor has no standing because he suffers no injury, since the law allows the loss to be passed through to the subcontractor. In fact, G&G has standing as both a prime contractor and subcontractor.

D. The Case Does Not Raise the Question of Whether a Contractor Who Has Not Alleged an Entitlement to Public Funds Can State a Claim for Denial of Due Process Based on the State's Withholding Said Funds

As a matter of law, a notice to withhold only has effect when money is due under the contract. The notice is similar to a writ of attachment. If a writ of attachment is served on a person who is not indebted to the defendant, the writ has no effect. If a notice to withhold is served on an awarding body that does not owe money to the contractor, the notice has no effect. If no money is owed under the contract, there is no money to transmit to DLSE as payment of the civil penalties. California law expressly provides that the notice to withhold seizes money due. The California Supreme Court explained the statutory provision as follows: "Deficiencies and penalties are to be withheld by the awarding body *from sums*

due under the contract. (§ 1727.)" *Lusardi v. Aubry* 1 Cal.4th 976, 986; 4 Cal.Rptr.2d 837, 842 (1992).

Where an existing entitlement under state law (such as money due under a contract) is eliminated, for cause, by state action (such as assessment of civil penalties for violation of state law, and an order to withhold money due to secure payment thereof), there is a deprivation of property. *Logan v. Zimmerman Brush Co.* 455 U.S. 422, 101 S.Ct. 1148, 71 L.Ed.2d 265 (1982). *American Manufacturers Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999) does not change this long established principle. DLSE's reliance on *Sullivan* is misplaced. In *Sullivan*, it had not been established that payment was due. In this action, the notice to withhold only has effect when money is due under the contract. The notice to withhold secures payment of civil penalties and wages allegedly due to third parties. The penalties and wages are transferred to DLSE from the money due the contractor under the contract. The notice to withhold is issued pursuant to the Labor Code, as a law enforcement action, and does not involve a contractual dispute between the parties to the contract. DLSE's contention that special status, such as tenure for a teacher, is required, is incorrect. *Cf. Board of Regents v. Roth* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Even a temporary, non-tenured teacher has due process rights, if money owed, is seized for civil penalties assessed for alleged violations of state law. *Sniadach, supra; Fuentes, supra.*

This case was decided in the District Court on summary judgment. The following facts were not disputed by DLSE:

"16. The notices to withhold issued by Defendants require awarding bodies to withhold monies otherwise due to contractors in the amount set forth in the notice.

26. The DLSE has issued notices to withhold to the Awarding Bodies of various public works projects on account of alleged violation of the prevailing wage law by Plaintiff. The projects for which such notices to withhold have been issued include those known as Moore Hall Seismic Renovation at the University of California, Los Angeles; University Center at the University of California, Santa Barbara; Recreation Center at the University of California, Santa Barbara; The Pyramid at California State University, Long Beach; Anaheim City Utilities Building; CSU, San Bernardino; San Joaquin General Hospital; Culver City, City Hall.

29. As a result of those notices to withhold still pending, which were issued by DLSE as to Plaintiff, there is at least $120,000 which has been withheld from monies otherwise due Plaintiff."

Ex. of Record No. 9, Docket Sheet ___, Plaintiff's Statement of Uncontroverted Facts and Conclusions of Law. *See also,* Ex. of Record No. 12, Docket 25, Defendants' Statement of Genuine Issues of Material Fact.

California law, and the undisputed facts of this case, establish that DLSE seizes money established to be due under the contract.

IV. AMERICAN MANUFACTURES MUTUAL INSURANCE V. SULLIVAN IS DISTINGUISHABLE, AND NOT APPLICABLE TO THIS CASE.

DLSE argues that *American Manufactures Mutual Insurance v. Sullivan* 526 U.S. 40, 119 S.Ct. 977 (1999) requires reversal of the Court of Appeals decision. DLSE is incorrect. *Sullivan* is distinguishable from this action in the following respects:

1. *Sullivan* involved a public insurer acting in a proprietary manner, as would any private insurer. This action involves a state enforcement agency exercising its regulatory power as government, enforcing the State Labor Code.

2. *Sullivan* involved disputes between the parties to the contract; whereas, this action involves enforcement activity by DLSE who is not a party to the contract.

3. *Sullivan* involved disputes as to whether money was due under the contract. This action involves the assessment of punitive civil penalties for violations of state law.

4. *Sullivan* did not involve seizure of money due, on account of third party claimants. This action involves the DLSE ordering seizure of money on account of third party claims (civil penalties allegedly owed the state, and possibly wage claims).

5. In *Sullivan* payment was not due; in this action payment is due under the contract.

Sullivan would be similar to this case if, after the worker in *Sullivan* had established the right to payment of a medical bill, a law enforcement agent ordered the

insurer to hold payment, for transmittal to the enforcement agency, as a civil penalty assessed for an alleged violation of state law. Under such circumstances, due process would require a pre-deprivation hearing, or prompt post-deprivation hearing.

V. THE COURT OF APPEAL DECISION DOES NOT CONFLICT WITH ANY OTHER DECISIONS

DLSE contends that the Ninth Circuit's decision in this case conflicts with other court of appeal decisions. DLSE has relied on cases holding that not all contractual disputes with public entities give rise to a due process claim. *See San Bernardino Physicians' Services Medical Group, Inc. v. County of San Bernardino* 825 F.2d 1404 (9th Cir. 1987); *S & D Maintenance v. Goldin* 844 F.2d 962 (2nd Cir. 1988); *Martz v. Village of Valley Stream* 22 F.3d 26 (2nd Cir. 1994); *Christ Gatzonis Electrical Contractor, Inc. v. New York School Construction Authority* 23 F.3d 636 (2nd Cir. 1994); *Brown v. Brienen* 722 F.2d 360 (7th Cir. 1983); *Bleeker v. Dukakis* 665 F.2d 401 (1st Cir. 1981). The Court of Appeal's decision in this case does not conflict with the cases cited with DLSE.

The Court of Appeal expressly distinguished this case, from the case cited by DLSE. The Court of Appeal explained that "unlike the cases cited by the State, this case does not involve a breach of contract claim or a challenge to the contract itself". *G & G Fire Sprinklers v. Bradshaw* 156 F.3d 893, 902 (9th Cir. 1998).

The cases relied on by DLSE involved contractual disputes between parties to a contract. The cases involved disputes, such as, whether payment was due under the

terms of the contract, or whether the contract was procured by fraud. In each such case, the defendant was a contracting agency acting in a proprietary manner. None of the cases involved the imposition of civil penalties, for alleged violations of state law, and the issuance of an order to the contracting agency seizing money on account thereof.

VI. THIS CASE DOES NOT INVOLVE MARKETPLACE ACTIVITY BY THE STATE

The petition suggests that this case involves marketplace activity by the State. This case concerns regulatory activity of the State, not marketplace activity. The Supreme Court has recognized that a governmental entity may act as regulator, or as a proprietor. Essentially, the difference is whether the government is acting as government, or merely participating in the marketplace as would any private owner of property. *See, Building and Construction Trades Council of the Metropolitan District v. Associates Builders and Contractors of Massachusetts* 507 U.S. 218 (1993); *Wisconsin Department of Industry v. Gould* 475 U.S. 282 (1986). In *Building and Construction Trades* the court explained that government acts as a marketplace participant, when it manages its own property, according to its purely proprietary interests, with no interest in setting policy, where analogous private conduct would be permitted. *Id.* at 229, 231-232. "States have a qualitatively different role to play from private parties. When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role . . . Moreover, as a regulator of private conduct, the

State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy." *Id.* at 229.

In *Gould,* the State of Wisconsin barred three-time violators of the NLRA from bidding on State construction projects. The Supreme Court held that such debarment was regulatory, not proprietary, and therefore preempted by the NLRA. The court explained that the debarment rule was an effort to promote public policy, and not merely to pursue the proprietary interest of the State.

The conduct of DLSE is wholly regulatory, and not proprietary. DLSE is not pursuing a proprietary interest. DLSE is not the owner of the property, or even a party to the public works contract. The awarding body does pursue certain proprietary interests in connection with its contracting for the public works project. There is no privity of contract between the awarding body and the DLSE. *Lusardi supra* at 995. The California Supreme Court has explained that there is a "direct and palpable conflict" between DLSE and the awarding body. *Id.* at 995. The awarding body has "an interest in obtaining the lowest possible cost for construction," whereas the DLSE has an interest "in enforcing the prevailing wage laws. Contractors that do not pay the prevailing wage . . . may be preferred by local government agencies for public works projects, because the construction dollar will purchase more when a contractor who is paying less than the prevailing wage is selected." *Id.* at 995. The California Supreme Court in *Lusardi,* and the DLSE in its petition, both assert that the purpose of prevailing wage laws is to protect and promote the interests of workers. The DLSE

operates pursuant to its statutory mandate to enforce the Labor Code. *Cal. Labor Code* § 90.5. DLSE imposes civil penalties for violation of the law. The actions of DLSE are to promote the public policy, embodied in the statutes being enforced. The actions of the DLSE are regulatory, and not merely proprietary.

VII. THE PETITION INCLUDES A NUMBER OF INCORRECT STATEMENTS

The petition includes many statements that are incorrect. A number of the incorrect statements are addressed below. Due to the number of such incorrect statements, not all incorrect statements are necessarily addressed below. The failure to mention any statement below does not constitute an acknowledgment that the statement is correct. Moreover, matters addressed in the foregoing arguments are not repeated below.

Page 3 of the petition states that a prime contractor, agrees in its contract with the governmental entity, that workers will be paid prevailing wages. Sometimes the prime contract does not set forth the obligation to pay prevailing wages. Nevertheless, the obligation exists as a matter of law. *Lusardi supra*.

The DLSE asserts on page 4 that prime contractors who hire G&G agreed in their contracts to certain requirements regarding prevailing wages. No evidence was submitted in that regard. The issue was immaterial. DLSE has asserted, and conceded in the District Court, that its authority to issue notices to withhold is not based on contract. DLSE has asserted, and concedes, that its

authority to issue notices to withhold is statutory, pursuant to its mandate to enforce the Labor Code. The California Supreme Court has held that DLSE's authority does not derive from contract. *Lusardi supra*.

Page 5 of the petition states that monies transmitted to DLSE pursuant to a notice to withhold are disbursed to underpaid workers, if a lawsuit is not filed to recover said monies. There is no evidence in the record that the money is disbursed to underpaid workers. In fact, the money is not necessarily disbursed to underpaid workers. Civil penalties, which constitute a large portion of monies seized, are retained by the state. Moreover, a notice to withhold may be issued, and often is, even if there are no underpaid workers who have been identified. Where no underpaid workers are identified, or if workers cannot be located, the state retains the monies seized for alleged underpayments.

Page 5, in footnote 5, states that the subcontractors may be unknown to the awarding body at the time the contract is awarded. The California Public Contracts Code requires a prime contractor identify all subcontractors in its bid. A subcontractor cannot be removed from the project without the approval of the awarding body, which may be granted only on certain specified statutory grounds. The only instance when an awarding body would not know of the subcontractor, is where it provides such a negligible amount of work that it falls within an exception to the general rule that subcontractors must be listed in the bid.

Page 6 of the petition states that a subcontractor who has been targeted by a notice to withhold may pursue a

remedy under the "stop notice" procedure set forth in the California Civil Code. The stop notice procedure does not provide such a remedy. The stop notice procedure allows any person who is owed money for work or materials at the project, including a subcontractor or worker, to file a stop notice with the awarding body. The stop notice requires the awarding body to withhold the amount of money claimed, pending litigation of the claim. Interestingly, the statutory stop notice procedure provides for due process, by allowing a prompt post-deprivation hearing. DLSE is authorized to file stop notices on behalf of workers, but refrains from doing so. Rather, DLSE uses the notice to withhold procedure, which does not provide due process. Rather than being a remedy for a notice to withhold, a stop notice would only make the subcontractor's situation worse. The DLSE notice to withhold seizes money owing to the prime contractor, and authorizes pass-through withholding of the subcontractor's money. The filing of a stop notice causes even more money to be withheld from the prime contractor. The stop notice is without merit because the prime contractor has not breached the subcontract. The prime contractor is authorized to withhold the same amount from the subcontractor, as damages for the wrongful stop notice. The filing of the stop notice simply causes the subcontractor to suffer a double penalty.

Page 6 of the petition states that G&G disdained utilizing any of its state law remedies, but rather filed this action. To the contrary, G&G filed this action for declaratory and injunctive relief because there is no state remedy which provides for due process.

Page 7 of the petition, footnote 6, states that no party contended that G&G was anything but a subcontractor on the three public works contracts at issue. There had been previous notices to withhold, which had been released. G&G contended that all of the notices to withhold, including those which had been released, combined with the threat of future notices to withhold, gave G&G standing to assert a claim for declaratory and injunctive relief. Notices to withhold had been issued against G&G both as a subcontractor and a prime contractor.

Page 9 of the petition states that a subcontractor targeted by a notice to withhold may sue the awarding body under various state law theories. This is incorrect. The Labor Code provides that the exclusive remedy for a notice to withhold is a lawsuit by the prime contractor or his assignee. *Cal. Labor Code* §§ 1731-1733. No money may be released until final judgment, and exhaustion of all appellate rights. *Krueger, supra.*

Page 18 of the petition states, that it is unknown whether G&G was owed any money under the terms of its contract. This is incorrect. The undisputed facts in the District Court established that the notices to withhold caused withholding of money due and owing to G&G.

VIII. CONCLUSION

The Petition asserts issues which are not raised by the facts of this case. The decision of the Court of Appeals does not conflict with any existing precedent. The Petition asserts a position that has never been adopted by any court, and which conflicts with long standing precedents

of the United States Supreme Court. The Petition sets forth no reason why long standing principles of due process should be abandoned. It is respectfully submitted that the Petition should be denied.

Respectfully submitted,

STEPHEN A. SEIDEMAN, ESQ.
LEVIN, STEIN, CHYTEN & SCHNEIDER
12424 Wilshire Boulevard, Suite 1450
Los Angeles, CA 90025-1048
Telephone: (310) 207-4663

Attorney of Record for Respondent